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THE PLACE OF GENERAL AVERAGE IN MARINE INSURANCE TODAY

Report by the UNCTAD secretariat

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INTRODUCTION

1. The Working Group on International Shipping Legislation (WGISL) at its thirteenth session in November 1991 considered the subject of general average, having before it a report prepared by the UNCTAD secretariat entitled "General Average - A preliminary review" (TD/B/C.4/ISL/58). The WGISL decided to request the secretariat "to approach, in close consultation with the Comité Maritime International (CMI), the insurance industry, including the International Union of Marine Insurance (IUMI), and international organizations representing commercial parties involved with general average, to study the extent to which insurance arrangements could simplify the operation of the general average system. The study should bear in mind the need to ensure equitable balance between the commercial interests and should consider, inter alia:

(i) The advantages and disadvantages of the use of absorption clauses in insurance policies;

(ii) The costs to the respective commercial parties of any new insurance arrangements."[1]

2. It also requested the UNCTAD secretariat and CMI "to consult insurance and other interests on the preparation of up-to-date statistics on general average, and in particular information on the time, place of adjustment (e.g. place or places where the contributory value is determined, enforcement of contributions, resort to court and applicable law and practice and preparation and publication of final adjustment) and expenses involved in general average settlements" (para. 2).

3. The WGISL further requested the secretariat "to consult governments of developing countries and commercial interests involved with general average, in particular in developing countries, on their experience of general average and also to seek to obtain the statistics required under paragraph 2 through the same channels".

4. The Standing Committee on Developing Services Sectors: Fostering Competitive Services Sectors in Developing Countries - Shipping, at its first session in November 1992, in establishing its work programme agreed to the completion of the ongoing work on general average in close collaboration with the relevant international commercial organizations including CMI, IUMI and AIDE.[2]

5. This report has been prepared in response to the above request. To obtain the necessary data for the preparation of the report, questionnaires were sent to Governments of developing countries and through them to their commercial parties requesting information on their experiences of general average including relevant data. A satisfactory response to the questionnaire was received, and although there were somewhat fewer replies than had been hoped for, several treated the subject thoroughly and allowed a comprehensive picture to be built up. Moreover, much of the information obtained complemented and corroborated the material compiled from other - mainly developed-country - sources. Over 400 cases have been reviewed, including many general average statements. They cover incidents that have affected most insurance markets in the world during the past 10 years.

6. In collaboration with CMI contacts were made with the insurance industry, including the IUMI, and other relevant international organizations representing commercial parties involved with general average, including the International Association of European General Average Adjusters (AIDE). In addition a large number of informal contacts were made and help was obtained directly from several industry sources.

7. This report summarizes and assesses the material gathered by the secretariat. The common findings which emerge from such a wide variety of sources, including actual general average adjustments compiled in many

different cities of the world, have led the secretariat to conclude that they are balanced and accurate. As such, the picture they present should provide much food for thought by Governments and maritime industry alike.

8. Finally, the UNCTAD secretariat wishes to acknowledge the assistance and cooperation received from Governments of developing countries and from several organizations and individuals in the preparation of this report, for which it expresses its deep appreciation. In particular, close support and cooperation was given by the CMI, AIDE and IUMI, who provided invaluable assistance in the preparation of the report.

Progress of work within the CMI[3]

9. Following the decision by the CMI to revise the York-Antwerp Rules 1974, as amended 1990, a Working Group was established which prepared a detailed questionnaire which was distributed to all national maritime law associations. A synopsis of the responses was then prepared for the CMI International Sub-Committee (ISC) charged with the task of studying the law of general average and the York-Antwerp Rules. A preliminary report following the questionnaire was produced by the Chairman of the CMI International Sub-Committee. The ISC met in full session on two occasions, in December 1992 and November 1993, and produced reports. The ISC, in reviewing the Rules, took due account of the work carried out within AIDE. The recommendations of the ISC on the revision of the York-Antwerp Rules will be submitted to the CMI Conference which is scheduled to be held in October 1994. The UNCTAD secretariat was represented at the meetings of the ISC as an observer.

Chapter I

INSURANCE TREATMENT OF GENERAL AVERAGE

A. Direct insurance

10. Insurance plays an important role in general average. The vast majority of ships and cargoes are insured, with both hull and cargo underwriters covering general average and providing general average guarantees when appropriate. In practice, therefore, when there is a general average it is almost invariably the insurer and not the cargo owner who pays for the cargo's contribution, while on the hull side the insurer pays the ship's contribution above the level of the deductible in the hull policy. Where there is an "absorption clause" in the hull policy the hull insurer agrees to absorb both hull's and cargo's contribution on general average incidents up to a set level.[4]

11. If cargo is not insured the cargo owner himself - normally the consignee - has to provide the security required. He may also have to provide security in case of under-insurance as the sum insured is not high enough to match the estimated contributory value of the goods. Sometimes the insurer guarantees the entire contribution in exchange for a counter-guarantee from the consignee for the proportion under-insured.

12. In almost every case seen in this survey, uninsured consignments were en route to developing countries, where many consignees are not only unaware, before the incident, of the very existence of the general average system but find great difficulty in providing the necessary security once general average has been declared.[5] In the adjustments which were the subject of the survey, under 10 per cent of interests were uninsured, accounting for less than 5 per cent of cargo values on the vessels involved. All were multiple-interest general cargo shipments, with many hundreds and even thousands of separate interests in containers and in break-bulk shipments.

13. The basic principles of general average under a marine insurance contract are usually set out in national law, but may be varied by the terms of the contract itself. For example Section 66(4) of the Marine Insurance Act 1906 of the United Kingdom provides that "where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute"; and according to Section 66(5) "where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer."[6]

14. Most national legislations contain similar provisions. In general terms there is widespread uniformity throughout the world in the way that marine insurance takes the burden of contributing in general average away from the owners of ship and cargo. The same approach is also followed in standard insurance clauses.

1. Cover under standard clauses

(a) Goods

15. Where goods are insured under current British market conditions general average and salvage charges are covered if incurred to avoid loss from any cause except those specifically excluded from the contract. For example, the Institute Cargo Clauses A provide that:

> "The insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in

connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 or elsewhere in this insurance".

16. The same wording appears in the Institute Cargo Clauses B and C, which give cover against a more restricted range of risks. In all these clauses the general average to be covered is stated as incurred to avoid or in connection with the avoidance of loss from any cause except those specifically excluded. Therefore, unless there is an exclusion elsewhere in the contract - such as for war risks - the insurer pays cargo's contribution even if the general average were caused by a peril not insured under the restricted risks cover. Thus a partial loss caused by bad weather would not be recoverable under the 'C' Clauses, but contribution to a general average caused by the same bad weather would be covered.

17. General average and salvage charges incurred as a result of war perils would be excluded from the marine policy, but included in the war cover normally bought in a single package along with marine and strikes risks. Similarly, general average and salvage charges incurred as a result of strikes perils would be recoverable under the strikes policy.

18. If the goods are under-insured the insurer is only liable for a reduced proportion of the general average contribution. In such cases the insurer normally acts on the assured's behalf in arranging guarantees in return for the assured's undertaking to meet his proportion of the final contribution.

(b) Hull

19. For hull interests the basic marine cover under Institute conditions, standard in the British market but used in many markets throughout the world, covers general average and salvage where the loss is incurred to avoid the peril insured under the contract. However, if there has been a sacrifice of the ship the assured (i.e. the shipowner) is able to recover in full for his losses from the hull insurer without first enforcing his right of contribution from other parties. If he is unable to enforce that right and obtains no contribution from cargo owners for their share, it is the hull insurer who shoulders the burden. The shipowner himself is freed from the practical necessity of pursuing the recovery. Unrecovered general average contributions from cargo are met in many circumstances by the shipowner's liability insurer under a protection and indemnity (P&I) cover.[7] The position in respect of insurance of freight is similar to that of hull insurance.

(i) Reductions for under-insurance

20. Marine insurance policies would normally pay the full amount of the general average contribution if the insured value were equal to or greater than the contributory value. If it were lower, the shipowner would be under-insured and would have to meet that proportion of the hull contribution left unpaid by the hull insurance, unless the shipowner takes out an "excess liability insurance" or the policy contains an express clause to the effect that "the vessel is deemed to be insured for its sound contributory value"; or "general average, salvage, salvage charges and sue and labour are payable in full irrespective of contributory and insured values."

21. In such cases the hull policy, in which a large part of the premium is paid to respond to the high levels of partial loss which characterize marine hull insurance, is made to bear more than its pro rata share for incidents involving general average loss.

22. If the ship's value has risen sharply through fluctuations in the sale and purchase market, and provided the owner can show that he has taken regular steps to check that the actual value corresponds to the total insured value under the hull and any excess liability policy, he can recover for unintentional under-insurance from his P & I Club.[8]

23. Thus, as can be seen, the involvement of insurers in general average is crucial and, not surprisingly, many of the complaints about the operation of the system over the past 100 years or so have been voiced by insurance interests.

B. Protection and Indemnity Insurance

24. Cover under Protection and Indemnity Club rules includes any proportion of general average contribution by cargo which is not recoverable by reason of a breach of contract of carriage.[9]

25. Unrecoverable general average forms an insignificant part of Club claims. This is illustrated by the annual reports of the West of England P & I Club, which show that since 1984 the percentage of total claims accounted for by unrecoverable general average was as follows:

1984	3.90
1985	2.22
1986	0.85
1987	0.80
1988	1.38
1989	0.65
Five-year average 1985 - 89 ..	1.18

26. During this period claims in respect of cargo's total share of the West of England P & I claims stood at about 42 per cent. Hence even in respect of cargo claims alone, unrecoverable general average contributions constitute a very small proportion of the total of all P & I claims.

27. In the publication "Analysis of Major Claims" produced by the United Kingdom Mutual Steam Ship Assurance Association (UK P & I Club) in 1992, out of 1,464 claims of at least $100,000, under 30 were for unrecoverable general average contributions, totalling less than $20m out of a total value of $784m for the 1,444 claims in the analysis. It is not surprising, then, that this form of loss scarcely warrants a mention in any P & I Club publication.[10]

28. P & I Clubs also cover the ship's proportion of general average contribution in case of under-insurance. While the hull policy occasionally includes a waiver providing for general average contribution to be paid in full despite under-insurance, the shipowner is also entitled to turn to his P & I Club to collect the difference between the insured and contributory values, provided that sufficient periodic review of the market value of the ship was undertaken according to the Club Rules.[11]

C. Specific insurance provisions outside the standard clauses

1. Absorption clauses

29. An absorption clause, or as it is sometimes called, a small general average clause, is inserted in hull policies to provide for hull underwriters to pay for all general average losses up to a certain level. There are no standard wordings for these clauses but, as might be expected, common patterns appear between different wordings. Sometimes these wordings are produced by the insurer, for example by the American Hull Insurance Syndicate, but more usually they are drafted by brokers. As they are copied from one broker to another, so they change to suit the format of that particular broker or indeed the person drawing up the policy conditions. They are more common in some markets than others. For example, they are found frequently in the United States and the United Kingdom insurance markets but much more rarely in German and Scandinavian markets. Although there is no overall standard, each broker tends to use his own wording for many different hull risks, perhaps varying certain elements only according to the nature of the risk. Some of those elements reflect real differences in the nature of the risk, but others appear to be almost random.

(a) The purpose of absorption clauses/advantages-disadvantages

30. Without an absorption clause the hull insurer would only pay hull's proportion of the general average, leaving cargo interests to meet their share of contribution. An absorption clause allows certain general average losses, normally those falling below a set financial limit, to be reimbursed by the hull insurer in full. By doing so, it removes the expense, time and effort involved in the general average process for any general averages thought small enough for that expense or effort not to be economically worthwhile.

31. Some absorption clauses eliminate the need for an adjustment to be drawn up, while others still require preparation of the adjustment. Thus, in the first case costs incurred in the general average process such as the adjustment fee and all ancillary expenses could be eliminated. Often cargo's proportion could amount to no more than the costs which are saved by not pursuing the general average. Moreover, general average causes difficulty for the owner, because he has to continue spending his capital on repairs and expenses even though he is uncertain of the final amounts he will receive and faces long delays in receiving payment for his own and cargo's proportion of the loss.

32. Average adjusters can also benefit from the elimination of small general average cases, because such cases tend to involve a disproportionate amount of work for the fee that can realistically be charged. Adjusters in some countries have a fixed tariff for their services (such as 5 per cent). Elsewhere where there are no tariff rules adjusters are in practice unable to charge fees that are out of proportion to the general average expenditure.

33. From the point of view of cargo interests, the use of any absorption clause relieves cargo from any need to contribute to hull's losses. However, because absorption clauses work to eliminate small general averages only, the global benefits can be limited. Moreover, since the shipowner has an option of whether or not to use it, and, as has been seen, can take up that option if it is in his interests to do so, it is more likely to be in those cases where cargo's contribution is less significant that the small general average provision will be invoked. Furthermore, the undertaking by the hull underwriters does not normally apply in cases where the general average mainly consists of cargo expense or sacrifice.

34. In multi-bill of lading cases, even very large general averages which are well above the threshold may include many separate cargo interests which are in themselves of a relatively small value. So from the point of view of cargo owners and their insurers the administrative costs of handling general average claims for those interests are still very high in proportion to the value. There are many general averages involving multiple cargo interests where a large number of those interests are required to pay less than $100 each as their share of the general average contribution, and the fact that it is uneconomic for them to proceed with the general average does not stop the hull interest from claiming from them. Moreover, on such small amounts it is rarely worth contesting a general average even if there are suitable grounds for doing so. Therefore in those cases cargo insurers often find it cheaper not to raise a legitimate challenge. Only a few instances have been noticed where small interests have deliberately been left out of a general average adjustment.

(b) The elements of an absorption clause

35. When the owner has decided that he wants to eliminate small general averages, he or his broker includes reference to a small general average clause in the proposal document and obtains the insurer's agreement. As a minor item in the negotiations, little attention would be devoted to the clause, and its exact terms would often not be negotiated at all. The wording is usually added later, although sometimes only a threshold is supplied. At other times a clause title is present but no clause is inserted

in the policy. This could lead to difficulties later because there seems to be an almost infinite range of absorption wordings, often poorly drafted, repetitive and occasionally contradictory.

36. However, there are common elements, while brokers tend to use their own wordings. There are also specific types of wording to address problems in particular trades. The core of the wording is normally a phrase like the following:

> "general average to be paid in full without contribution from cargo or other interests where the amount of general average does not exceed $.....".

37. Another version provides that:

> "in cases where general average is estimated not to exceed $..... general average is to be paid in full."

38. The first version points to a major problem inherent in an absorption clause. Until the general average statement has been prepared it is not certain how much the amount of general average loss will be in total.

39. A different approach may be seen in the following text:

> "if total general average expenditure does not exceed $..... no general average statement will be prepared, in which case such general average will be chargeable to underwriters insuring the vessel."

40. Some absorption clauses specifically give an option to the shipowner to decide whether or not to claim under the clause:

> "in cases where general average is estimated not to exceed $..... or currency equivalent, the assured to have the option of deciding whether or not they will claim the whole of the general average under this insurance or claim from the cargo as they think fit."

41. This wording shows very clearly that it is for the owner to decide whether or not it is convenient for him to declare and proceed with a general average. Even if the optional element is not specifically stated in the clause, there is always effectively an option since the shipowner may merely decide not to claim cargo's proportion under his hull policy if he wishes to claim against cargo interests instead.

42. The wordings of some clauses introduce more details concerning deductibles:

- "the deductible not to apply to general average and salvage, salvage charges and sue and labour claims";

- "the assured have the option of deciding whether or not they claim the whole of the general average under their hull insurance up to a limit of $..... after application of the policy deductible or claim from cargo .....".

43. In the first example, all small general averages would be paid in their entirety by the insurer - both the hull and cargo proportion. By contrast, in the second example general averages below the deductible would actually fall back to the shipowner, so in those cases he would continue to have an incentive to claim against cargo for cargo's proportion. It would only be with losses above the policy deductible that he would have an incentive not to proceed with the general average.

44. Several other variants appear, although not by any means consistently:

> "in such cases of charging the whole general average (to the hull policy) no commission or interest to be charged."

45. Another issue occasionally referred to in some clauses is adjusters' charges: "adjusters' charges not deemed to be part of ..... (the threshold) as referred to above." This raises the threshold of the amount payable in full under the absorption clause. Some absorption clauses provide for a flexible threshold:

> "General average involving sacrifice or expenditure up to $....., or higher amounts as specifically agreed, to be unapportioned and payable hereon....."

46. The latter increases the shipowner's opportunity to examine the economics of each general average incident. If there were likely to be a very low cargo contribution it would make immediate sense not to proceed with a general average even if the total general average was likely to be well above the threshold. The following wording specifically excludes cargo sacrifice or expenditure:

> "this agreement not to apply where the general average consists mainly of general average sacrifices and/or damage to cargo, in which case a statement should be drawn up, unless uneconomic from the standpoint of hull interests."

47. It is scarcely necessary to comment on the approach taken by this wording. Clearly, hull may be prepared to accept its own losses, but any suggestion of absorbing sacrificed cargo is firmly avoided unless the costs of absorbing that sacrifice would be less than the cost of proceeding with the general average.

48. In addition to the wordings already referred to, which are applicable to any type of ship, there are also occasionally wordings for specialist trades, notably ferries. The difficulty of obtaining security from non-commercial traffic and roll-on/roll-off traffic on ferry routes, combined with relatively low individual values for such interests, the desirability of avoiding alienating such users to whom general average will be a very strange concept, have led to the development of the following type of wording:

> "Following a general average act and/or salvage contract, such general average and/or salvage contributions which are due from owners of commercial and/or private vehicles carried on the assured's vessel are waived hereunder and coverage is extended to include payment of such contributions for these owners to other interested parties."

49. It is to be noted that in these cases general average would proceed normally, so other interests would pay their own proportion and the only difference would be that the hull would absorb the share of certain interests only.

(c) Level of thresholds on general average absorption clauses

50. There is a very wide variation in the threshold included in a general average absorption clause, which is necessary to cater for vast differences in insured values. In rather more than 300 policies surveyed there were very few in which the level was set below $50,000. Often these limits do not seem to have been revised for several years. However, by virtue of increases in the overall policy deductible, the level at which the absorption clause threshold operated would still rise to some extent as values and deductibles were increased.

51. With smaller vessels the norm seems to be a threshold of $50,000, with scarcely any being noted under that level. For larger vessels and fleets, where higher policy deductibles apply in any case, the minimum level is normally $100,000, rising frequently to $200,000. In some cases limits are much higher. For example, for large container vessels where there may be many thousands of separate cargo interests and the cost of an adjustment can be significantly higher, the threshold may be as high as $2m.

(d) **Extent of use**

52. As already mentioned, the use of absorption clauses varies widely between markets, with most use seemingly found in the United States and United Kingdom markets. On the evidence seen, up to a third of insurance contracts in those markets may contain absorption clauses, but since these range from contracts for single vessels to insurances embracing very large fleets, it is impossible to say precisely what proportion of shipping is insured on terms including an absorption clause. With such variations in practice between markets and indeed between insurance brokers, it is difficult to see any tendency towards uniformity of practice or of wording developing without shipowners and the insurance market being persuaded to address their minds to this problem.

Chapter II

THE CURRENT EXTENT AND IMPACT OF GENERAL AVERAGE

A. Number of incidents

53. There is no single source to show the total number occurring every year. However, it is possible to estimate the extent of general average in maritime casualties from records published on major partial losses. Not every such casualty would lead to the declaration of general average, but from the description of the circumstances of the loss a reasonable assessment can be made of those cases which could lead to a declaration of general average. The number of major partial losses recorded over the past 10 years by the International Union of Marine Insurance is as follows:

Major Partial Losses - 1984 to 1992[12]

	Tankers	Bulk and Combination Carriers	Other Ships	All Ships
1984	22	35	128	185
1985	30	54	185	269
1986	36	30	148	214
1987	36	52	128	216
1988	39	47	144	230
1989	46	50	142	238
1990	50	61	134	245
1991	43	57	155	255
1992	47	61	159	267

54. Examination of the circumstances of those major casualties reported in Lloyd's List over the past three years indicate that about 70 per cent of them are likely to have led to the declaration of general averages. Of the estimated 70 per cent, about two thirds (45 per cent of the total) involved towage, and the remaining third other likely general average expenses such as measures to extinguish fire, refloating or entry into a port of refuge.

55. Compilations of more minor partial losses are not published at present, but their number can be deduced from casualty information found in Lloyd's List and which appears to be at least eight times higher: to some extent these lesser casualties mirror the major ones but involve fewer tows or other typical general average act. As data compiled for this study will show, general average incidents span the entire range of casualties from the most serious to some very minor incidents, but many of the small casualties would certainly not be worth the expense of an adjustment.

56. Another source of information on the likely annual total number of general averages is contained in a survey carried out by the CMI International Sub-Committee,[13] on the basis of information obtained through a questionnaire sent to regular and corresponding members of AIDE. The report was presented to the AIDE International Sub-Committee in 1993. It records 425 average adjustments as being issued over a 12-month period in 1990-1991 by the adjusters' offices (45 adjusters' offices in 18 maritime countries) replying to the survey. It was estimated on the basis of these figures that the worldwide total for adjustments in 1991 would have been a maximum of 850.

On the basis of these estimates and taking account of the deductions that can be made from the casualty reports, it is not unreasonable to assume that the current yearly average of incidents leading to declaration of general average is about 800.

B. Increased or decreased use?

57. It has been more difficult to establish whether there is any tendency for general average to become more or less frequent. For example, data from some developed insurance markets suggests a substantial decline, of about 40 per cent, in the number of general average incidents recorded between the mid-1970s and the mid-1980s. However, such data can be misleading because many different factors influence the level of general average that may be recorded:

- fluctuations in the amount or type of business underwritten would lead to comparable fluctuations in the number of claims. Other things being equal, a reduction in the number of cargo accounts insured should produce fewer general averages. The amount of business written can change sharply from one year to the next in response to changes in premium rates and loss experience, so a market's perception of the incidence of general average would reflect these fluctuations;

- a rise or fall in world trading activity can produce a wide variation in the numbers of maritime accidents occurring each year, and a rise or fall in casualties could be expected in turn to lead to a corresponding change in the number of general averages occurring; other factors such as the introduction of compulsory local insurance of imports during the past 15 years may mean that some developed markets have seen a fall in their traditional cargo business as it has migrated to newer markets in developing countries; and

- insurers' own reporting methods are subject to change from year to year, while general average data are often not separated from general claims reporting but classified in other ways (for example, by size of claim or cause of loss).

58. More recently there have been some reports of a sharp downturn in 1992 and 1993, allegedly because of the impact of general average absorption clauses. Although some data appear to bear this out, the fall may also reflect a drop in cargo business in the markets in question. Overall profit margins are very low on large business, with too many insurers competing for too few accounts, and after extremely bad results in several markets since 1988 many insurers have either withdrawn or become far more selective about the business they are willing to underwrite. Some adjusters have commented on a reduction in the number of cases they are handling but others have said that activity remains the same. With the inevitable time-lag in the general average process it will be some years before it is possible to confirm whether there has been a decline or how steep such a decline may be.

C. The ships involved in general average

59. As is the case with world casualty rates as a whole, the majority of general average incidents in the survey involved ships other than tankers or bulkers, which for the sake of simplicity will be referred to as "other" ships below. When the shipping involved in the survey is totalled by tonnage, however, the proportions are much more evenly balanced between the three categories of ships, as can be seen in the following table:

General Average Incidents Compared with Total Shipping Afloat

Ships	Tankers		Bulkers		Other ships	
	GA incidents	All afloat	GA incidents	All afloat	GA incidents	All afloat
Percentage by numbers	11.9%	11.5%	18.1%	6.5%	70.0%	82.0%
Percentage by tonnage	35.9%	35.8%	27.7%	30.8%	36.4%	33.4%
Average gross tonnage of ships in sample	40 000 gt	-	20 000 gt	-	7 000 gt	-
Total numbers in sample	260					
Total tonnage in sample	3.4 m. gt					
Total shipping afloat	Figures derived from Lloyd's Register of Ships, Annual Statistics, 1992.					

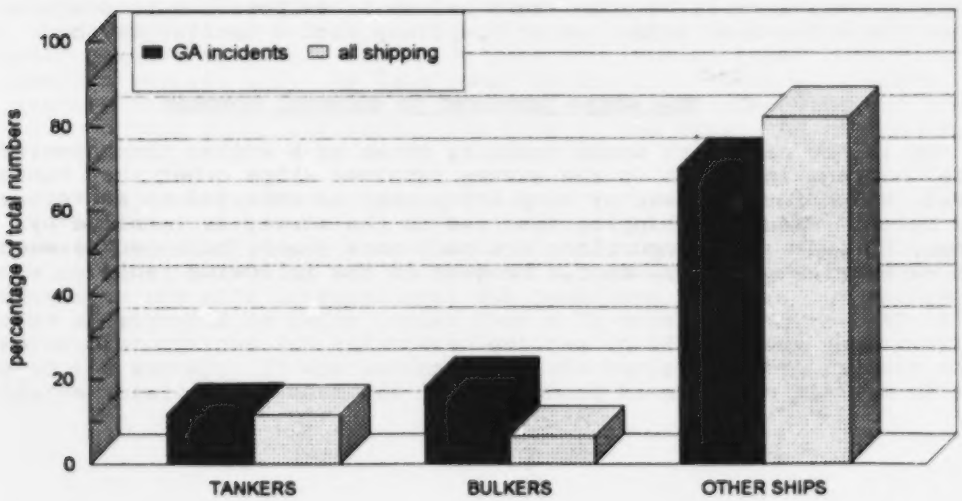
60. The numbers measurement is helpful in showing the overall frequency of incident and has some validity in assessing how various types of trade are affected. Tankers and bulkers tend to ship only one or a small number of interests on any one sailing, while other ships vary greatly from those with a single interest on board to container and large general-cargo vessels with hundreds or even thousands of separate cargo interests.

61. The tonnage measurement has validity in relation to the amount of cargo shipped, showing a much more even spread between the three categories. It should be remembered that values of tanker cargoes are usually far higher than the values of cargoes carried by bulkers; values on board other ships are much more variable.

62. Bulk carriers (including ore carriers and ore-bulk-oil carriers) clearly account for more than their fair share of incidents. This is very much the case in terms of numbers, indicating that the smaller bulk carriers are more prone to involvement in general average. Bulk carriers are well known to have a disproportionately high casualty rate, so these figures are to be expected. By contrast, the share of tanker general averages exactly reflects tankers' share of world tonnage.

General Average According to Ship Type

(comparing incidence of general average with all shipping afloat)



D. Age of ship

63. The average age of ships involved in the sample monitored was 13.7. This does not in itself indicate a disproportionate involvement of older ships in general average, since the average age of all ships is close to that figure. However, when the distribution between age groups is studied it becomes clear that general average occurs rarely in ships under four years of age. Its incidence then increases rapidly at a fairly consistent rate between seven and 18 years of age.

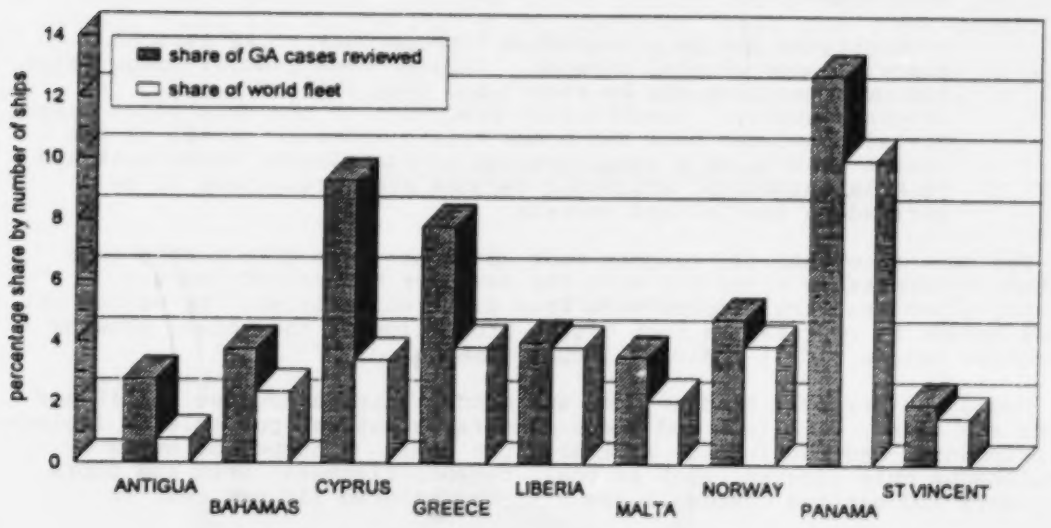
64. The decline in ship values as age increases means that it becomes progressively more attractive for an owner to declare general average since the ship's value represents a steadily reducing proportion of total contributory values. Conversely, on a high-valued newbuilding cargo's proportion would be less significant. Exceptions to this general rule would be in trades where lower-value cargoes are normally carried on older vessels because of the cheaper freight available.

E. Flag

65. Open registry (flag of convenience) ships were involved in a significantly higher proportion of incidents than their share of world shipping. The flags of Panama, Cyprus, Bahamas, Malta, Antigua and Barbuda, and St. Vincent and the Grenadines have a 12.2 per cent share of world shipping by numbers,[14] but accounted for 34.2 per cent of general average incidents monitored (sample size 280). Although there may be some regional distortions in shipping activity which could conceivably cause this proportion to be over-estimated, any such over-estimation is likely to be very slight.

66. Moreover, examination of one flag in particular, accounting for a significant proportion of world shipping, shows that general averages among ships of that flag were typically twice as serious as well as more frequent than the norm.

Flags of Ships Involved in General Average
(showing comparison with share of world fleet)



67. One may conclude that ship condition and manning is a significant factor in determining the frequency of general average. General average may therefore be seen as a means of enhancing an unfair competitive advantage to sub-standard shipping, operating to the detriment of the responsible majority of shipowners and discouraging the raising of safety standards.

F. The cargoes affected

68. The cases reviewed included an extremely wide variety of cargoes: almost anything that could be transported by sea appeared to be involved. While this gave confirmation that the study was broadly-based, it also gave a warning that there were too few instances of most individual products for a clear picture to emerge of which individual items were more likely to suffer a general average than others. Nevertheless, by grouping products together according to broad types a number of conclusions may be drawn, of which the first is that general average can - and does - affect more or less every type of cargo. The following points are among those which must be remembered in analysing cargo data:

- domestic insurance markets are likely to insure a range of imports and exports that corresponds closely to their country's pattern of trade. Thus a country producing enough forest products for its own needs might not import or export them, and such goods would not feature in its insurers' cargo loss data;

- international insurance markets would not suffer so much from these imbalances, but might not present profiles truly representative of world trade. The Antwerp insurance market traditionally insures much of the international grain trade through its close connections with the international bulk grain markets, so such cargoes could easily appear over-represented. Without detailed information on grain shipments by number, value and share of the insurance market - data conspicuous by their absence - it would be impossible to assess the relative impact of general average on any particular commodity;

- similarly, a few very large cargo accounts in any one market may also distort the findings. The disappearance of a large cargo account might lead to the apparent disappearance of losses for that commodity;

- many cargoes may be transported both in bulk or as part of miscellaneous general cargoes. Indeed, many general cargo ships and bulk carriers may be used - and even defined - interchangeably. Insufficient precision in the data often makes division between bulk and break-bulk difficult. Steel is one common example of a cargo carried in containers, break-bulk and in bulk shipments, while oil cargoes are more likely to be carried on specialized vessels.

69. The data show that oil cargoes made up 12 per cent of all shipments affected, a remarkably close fit with the data for numbers of tankers involved, given that the samples were from different sources. By value, oil cargoes appear to represent a much higher proportion of the total, showing the highest values of all individual consignments.

70. Among the dry bulk trades, ores and concentrates accounted for 10 per cent of the total, with iron and steel - as far as it was possible to isolate bulk shipments - accounting for another 8 per cent. A number of other miscellaneous bulk cargoes, such as coal, cement, fishmeal, urea and copra, fertilizers and various chemicals are also represented (10 per cent in total).

71. Grain trades (wheat, rice, etc) accounted for 8 per cent, while forest products (softwoods, tropical hardwoods and timber products) accounted for 7 per cent.

72. Despite the difficulty in definition, general cargo incidents comprised at least a third and probably 40 per cent of the total, while the remaining 5 per cent of incidents were on vessels used in specialized trades - reefers, vehicle carriers, etc.

73. Incidents where containers were on board ship - not necessarily on purpose-built container ships - represented about a quarter of the total. However, as might be expected they involved some of the highest contributory values and accounted for a high proportion of the largest general averages.

G. The events which lead to general average

74. There are many different causes of general average which have an important bearing on any analysis of the subject. A study of how often incidents occur through particular causes allows one to assess the role played by the parties involved.

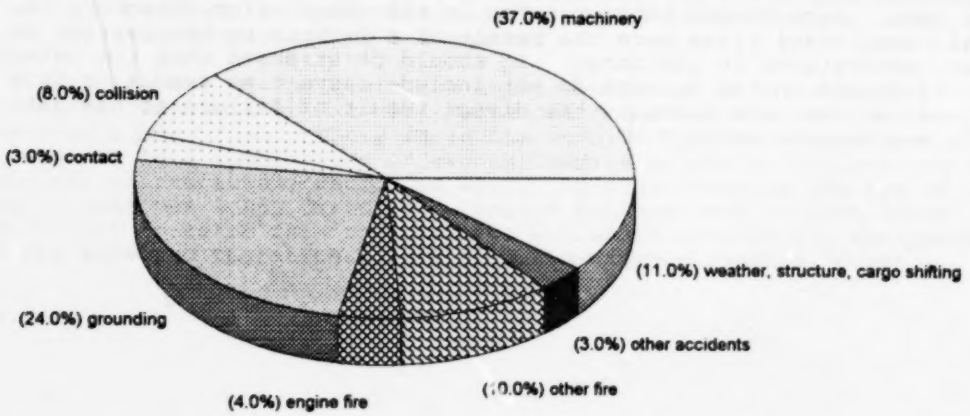
75. In the cases examined machinery breakdown or damage emerges as the most common cause of general average. At 37 per cent (of a sample of 440), it accounts for over a third of all incidents monitored, with different samples bearing this out almost uniformly.[15] Engine fire, which has been recorded separately from other types of fire as far as possible because of its close relationship with engine breakdown or damage, accounts for a further 4 per cent - a total of 41 per cent for incidents connected with the ship's generating, propulsion or steering machinery.

76. As regards incidents involving navigation, groundings represent about a quarter of the total (24 per cent), and cases of collision and contact account for 8 per cent and 3 per cent, respectively.

77. About 10 per cent of incidents arise from fire other than engine fire - in the hold or elsewhere on board. Accidents where navigation has not been an issue, such as fouling of propellers by nets or wire, lead to about 3 per cent. The remaining 11 per cent include a variety of incidents which have been difficult to segregate from each other - bad weather, structural failure or damage, listing and the shifting of cargo.

78. Occasionally general averages arise through war or terrorist action. At present these are statistically insignificant (less than 1 per cent), although during the 1980s several arose as a consequence of the Islamic Republic of Iran-Iraq war, involving high values for the ships and their oil cargoes. The sample used for this study included details of some such incidents.

The Causes of General Average
(showing which types of loss arise most frequently)



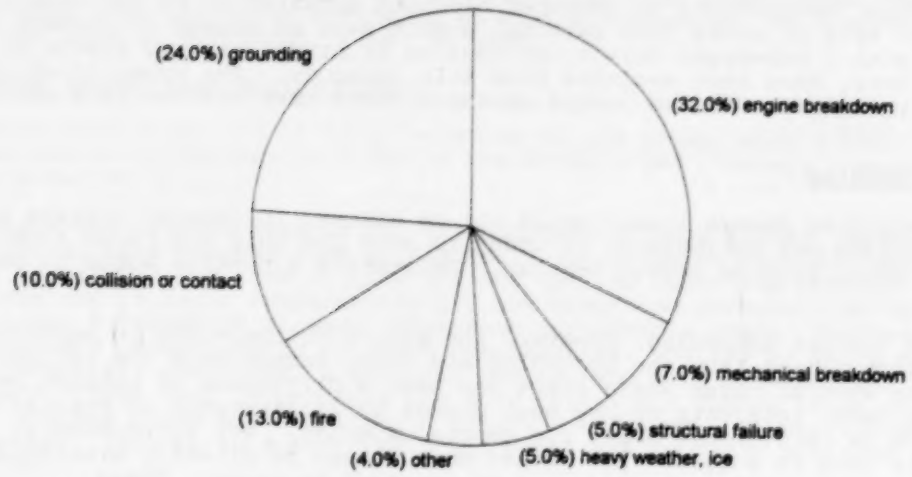
79. The causes of general average correspond reasonably well with the causes of the major partial losses reported in the monthly summaries in Lloyd's List. They also show similarity with the report presented at the IUMI 1993 Annual Conference which details the distribution of general average losses, although the classification of losses used by IUMI was slightly different.

Causes of General Average
(comparison between findings of IUMI and this study)

Type of incident	Findings of this study	IUMI 1993 report
Machinery failure	37%	-
{Engine failure	-	32%
{Mechanical failure	-	7%
Collision	8%	-
Contact	3%	-
Collision or contact	-	10%
Grounding/Stranding	24%	24%
Engine Fire	4%	-
Other Fire	10%	-
Fire	-	13%
Other accidents	3%	-
Other accidents (inc. cargo shifting)	-	4%
Weather/Structure/Cargo shifting	11%	
Weather		5%
Structural failure		5%

80. The report further stated that IUMI "studies show other evidence confirming the role of the vessel in the occurrence of general average. There are notable differences between good and bad owners, between new and old tonnage and between better and worse flags. This seems to suggest that good shipowners who declare general average very infrequently may be at a disadvantage when compared with bad shipowners who can look to recover more of their costs from cargo as well as from their hull underwriters. The effect is magnified for cargo on older ships - not only are there more incidents but the contributory value of the ship is far lower as it gets older, leading to a heavier financial burden for cargo." It went on to say, "The causes of general average incidents themselves indicate the importance of the condition of the ship and the way she is navigated in leading to the incident in the first place. The ... pie chart [below] shows clearly how the condition of ships, and particularly their engines, accounts for a large part of the rest. Fire in the hold or cargo is the other major category; in several cases these fires were the result of a failure by the carrier to monitor temperatures in the cargo. It should be stressed that the categories of grounding and engine failure do not include casualties resulting from heavy weather, but are normally the direct result of failure to navigate or run the engines correctly."

IUMI findings:
The Causes of General Average
(by number of incidents)



81. The various types of general average raise a number of different issues including problems of definition. Some of these are treated below.

1. **Machinery failure**

82. By machinery failure this study refers to damage, breakdown or failure of main and other engines, generators and electrical equipment, shafts, propellers and rudders.

83. In the cases outlined in this investigation the primary reason for machinery failure, where information was provided in statements or claim files, was negligent maintenance. In some cases it appeared that crew negligence leading directly to the failure had occurred during the voyage in question, but in other cases it was clear that crew negligence or insufficient maintenance dated from well before the sailing.

84. Included as machinery failure are cases where breakdown of the engine, or an electrical blackout or the rudder jamming led to another type of incident such as grounding/stranding or contact with a pier. In most cases severe weather was not a factor - where it is clear from the statement that heavy weather had led to water entering the engine accommodation, the incident has been attributed to bad weather.

85. A small number of incidents are attributable to latent defects, negligence of repairers or external maintenance contractors, and a few to contaminated bunker fuel. Where incidents involve contaminated bunker fuel there tends to be a combination of events leading to engine failure, with insufficient maintenance a factor as well. In older vessels the age of the machinery sometimes leads directly to engine failure, and in such cases it is more difficult to establish from the data available whether the equipment had passed its expected operational life or was damaged through a "pure"

accident. Nevertheless, on the evidence of the sample the vast majority of engine failures were not "pure" accidents.

86. Reports of incidents of failure to rudders, propellers and shafts were not detailed enough for meaningful conclusions to be drawn. Latent defect in the failed object was invoked as a cause in some cases, but in others insufficient maintenance or improper handling appeared to be the reason. Incidents said to arise from external events such as damage to rudders by contact with a submerged object, or fouling of propellers and shafts by fishing nets, have been excluded from this category. The cases in which machinery failure entailed towage exceeded those that did not in a ratio of eight to five.

2. Grounding

87. Grounding damage itself would not be allowed in general average unless the grounding was deliberate, in order to save the ship and cargo from another peril such as severe weather. Deliberate grounding seems to be rare.

88. In typical grounding, however, the ship's bottom might be expected to suffer some damage from the grounding and other damage from the refloating. There are several cases where there has been a difference of opinion between hull and cargo interests on how much damage is attributable to refloating and therefore is recoverable under the general average. Not surprisingly, hull interests tend to suggest that rather more damage is directly attributable to the refloating operation than would be accepted by cargo. These disagreements lead to litigation as well as to protracted negotiations while the statement is being completed, and can later delay settlement for several years.

89. The study does not class an incident as a grounding if it results from machinery failure, severe weather or some other cause. The main reasons for grounding appeared to be a failure to follow correct channel markings on entry to or exit from port and through the shallows in the port approaches or other channels. In some instances the ship is said to have been larger than the normal maximum for the port at which it had grounded. In a small number of cases there were contributing external causes - mainly alleged strong river or currents which hampered the ship's manoeuvres.

90. Unlike machinery failure, grounding is not as likely to be the result of an act or omission before the voyage, unless the appointment of inadequate crew and failure to ensure that the ship is not sent to a port too small for her and without correct and up-to-date charts can be shown to have led to the accident.

3. Collision and contact

91. A number of collisions are followed immediately by fire, such as the one which engulfed the tanker "Nagasaki Spirit" and container ship "Ocean Blessing" after their collision in 1992. This is one reason why collision general averages are often extremely serious, with very high losses related to extinguishing damage, salvage and other expenses being reapportioned by the average adjuster.

92. In comparison, the relatively few cases of contact with piers, wharves and oil platforms which arise rarely lead to much damage for the general average account; most such incidents occur in port with assistance close at hand, and costs can be kept down. This is not invariably so, however. In one case reviewed, the ship struck a swing bridge outside the port, had to be towed for the remainder of the voyage and stranded, during the tow, leading to a general average of 30 per cent of contributory value. Partial loss to the ship can also be heavy.

4. Engine fire

93. Fire originating in the engine room can usually be separated from fires breaking out in other parts of the ship, although in a number of incidents it has not been possible to determine the origin, and some have certainly been included in the category "fire other than engine fire".

94. It is helpful to separate engine room fires from other types, because in many ways they are closely related to engine breakdown. An overheated engine may lead to breakdown, fire, or both.

5. Fire (other than engine fire)

95. Most such cases are of fires starting in the holds, with a small number breaking out in accommodation areas or the bridge, and - rarely - spreading from outside the ship.

96. There are various reasons for the outbreak of hold fires: spontaneous combustion of some cargoes such as fishmeal, copra, wheat or coal, which are subject to heating and fire if they are not carried under the correct conditions and if their temperatures are not monitored carefully by the ship's crew; collapse of stowage underneath inflammable items; discarded cigarettes and other results of human carelessness, whether by shore or ship's personnel; occasional electrical faults; and fire breaking out within containers. This last is probably the only relatively common cause of general average which may sometimes - though not always - be attributed to cargo owners' failure to ensure their shipments are properly prepared or identified.

97. More commonly, there is difficulty in obtaining access to a burning container because it is buried beneath and between many other containers. As a result it may only be possible to extinguish the fire by flooding the hold up to the level of the container on fire, causing substantial damage to other cargo. Loss from the fire alone would be treated as particular average, to be borne by that interest only, while loss caused by water used to extinguish the fire would be allowed in general average and shared between all hull and cargo interests. As with bottom damage in grounding cases, it can be difficult to distinguish between loss caused by the general average act and particular average loss after a major fire, leading again to protracted disputes between the interests concerned. This type of loss is an example of where there may occasionally be major general average loss to cargo while the ship is relatively unscathed, one of very few instances where there can be an effective redistribution of loss from cargo to hull. However, in practice the high total contributory value of all cargo together in comparison with the hull means that most redistribution is among the various cargo interests.

6. Other accidents of navigation

98. These include casualties which by and large result from the ship coming into contact with invisible objects such as wrecks, fishing lines and marine debris, some of which can severely damage its underside and notably the propellers and rudder. Negligence on the part of the ship for such incidents is unlikely. It also includes a small number of cases where the ship collides with an anchor chain or where a tow line parts.

7. Bad weather (including ice damage, listing or cargo shifting)

99. It is difficult from the evidence in many of these cases reviewed to make a distinction between cargo which shifts because it has been poorly stowed, and cargo which shifts because the weather is bad enough to cause it to shift regardless of stowage. Similarly it is difficult to distinguish between structural failure which arises mainly because the ship is in poor condition and that which would arise in any event because of the severity of the storm. The cause of such incidents can easily be identified at either

end of the spectrum but for the most part the causes are uncertain in the middle, so all such losses have been grouped together.

100. Most instances of cargo shifting are likely to be attributed to negligent stowage, and even though the shift may have taken place in a storm the probabilities are that it would have been preventable if the cargo had been properly stowed for the voyage in question before the ship had sailed. Structural failure often develops in heavy seas through the immense forces exerted by wind and waves. However, a seaworthy ship should be strong enough to resist rough weather in the seas in which she sails and only exceptionally severe conditions should be capable of causing such failure. The difficulty of establishing whether the sea was exceptional or not is considerable, though the susceptibility of older ships to this peril indicates that gradual deterioration in the ship's strength through age has a part to play in addition to the storm.

101. At the same time, a number of cases also occur where a part of the ship - deck plating, cargo hatches, shell plating or internal structures - collapses or ruptures without apparently being affected by severe weather. Examples include cargo hatches being broken through negligent handling by the crew and the bulkhead of a hold collapsing under the weight of cargo stowed against it. Not surprisingly, age is even more important here: all the examples seen were in ships 16 years old or above.

8. Conclusions

102. It appears from the survey that there is a preponderance of general average incidents resulting from errors or negligence in the maintenance, operation and navigation of the ship. Adding machinery failure and engine fire (41 per cent) to collision, contact and groundings (35 per cent) produces 76 per cent - over three quarters of all general averages. Most of these appear to involve an element of negligence, but even assuming completely unforeseeable accidents in some of these cases the remainder still amounts to a substantial proportion. On the basis that a not insubstantial proportion of the remaining cases of fire, bad weather, structural failure and shifting cargo were probably also attributable to negligence, it can be concluded that negligence was the cause or the contributing cause of the great majority of the cases studied.

103. A similar estimate was given in a report prepared by the Chairman of the IUMI Working Group on General Average.[16] The report considered that:

> "A substantial majority of general average incidents take place because of negligent acts or omissions by the ship. ... at least two thirds of all incidents, and probably more than 80 per cent, stem from such negligence. The York-Antwerp Rules do not make any distinction in treatment according to whether there has been negligence (Rule D). It is only when there is a right of action that cargo interests may be entitled to refuse payment of any contribution asked from them. As the Hague and Hague/Visby Rules exempt shipowners from liability for certain acts or omissions of the crew during the voyage, the only current circumstances where there is a right of action are when carriers have failed to show due diligence. However, our studies show a surprising number of incidents where a lack of due diligence is clearly a factor and where underwriters' survey reports show serious cases of poor maintenance. One example showed an oil level which was persistently less than a third of the minimum safe level for several months before the incident occurred, with the audible warning system being ignored during the whole of that period. Others concern ships setting sail from a port where fires had not been properly extinguished but flared up again later at sea leading to major additional costs. Even though in such cases it should theoretically be possible to repudiate a general average, in practice it is often very difficult to resist. Underwriters should be concerned at the lack of justice in a

system which regularly allows losses caused by the negligence of one party to be paid by contributions from others."

104. There have been several studies recently into the role played by error or negligence in marine casualties. While not always directly comparable, they also show how these causes are predominant: for example, a figure of 90 per cent for error and mechanical, structural or equipment failure in the UK P & I Club's "Analysis of Major Claims" (1992).

H. General average losses/contributions

105. There are two ways of assessing size of general average losses:

(a) through the percentage contribution applicable to each general average, and
(b) through the losses incurred in money terms.

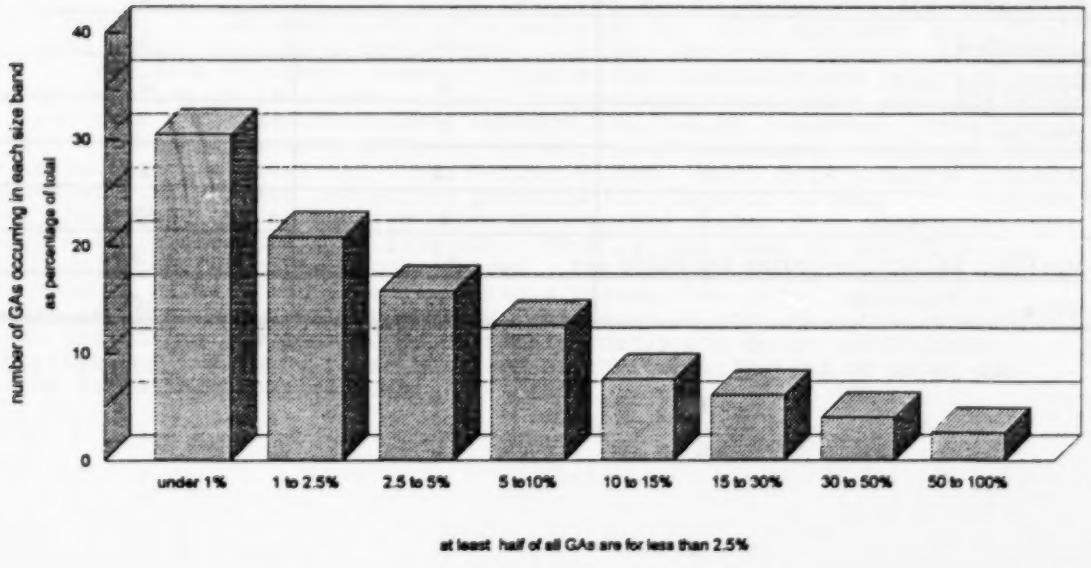
106. The first approach takes as its measure the proportion that the general average loss bears to total contributory values. The value of analysing percentage contributions in general average is that it allows the severity of the incident to be measured in terms of its financial effect on the parties concerned. For example, a small vessel and cargo might suffer a general average loss of 50 per cent of total contributory values, but with a total amount involved of perhaps no more than $1m. On the other hand, a loss of $1m involving a large container ship with highly-valued cargoes and a large hull value might be less than one per cent of the total contributory value and relatively insignificant for the participants.

107. The second method, where the actual values involved are taken, shows the actual financial impact of general average - as reflected in the adjustments themselves on the world's insurance markets.

1. Contributions in percentage terms

108. The chart which follows shows clearly how the great majority of contributions are small in relation to the total values at risk. At least half of all incidents lead to contributions of 2.5 per cent or less of the total contributory value, with two thirds under 5 per cent. Only a very small proportion are above 30 per cent. An investigation carried out by IUMI, and another similar but independent exercise (carried out by Swissreinsurance Co.) analysing general average between 1982 and 1988 as it appeared in data available to a European insurance market, showed an almost identical distribution.

General Average Losses Related to Total Contributory Values
(with contributions expressed as percentage of total contributory values)



109. Although as already noted small percentage general averages can be large in money terms, their impact on the traders concerned is still low in terms of the values at risk, and even lower on the insurance markets which meet almost all the losses in practice and which are already engaged in global distribution of losses between the mass of policyholders paying hull and cargo premiums for that purpose. If it is assumed, for the purpose of this example, that ship and cargo values are about equal, then in most of the cases the total general average would represent only a small proportion of the value of the ship. If one excludes the additional administrative costs included in general average on top of the action taken to get the ship and cargo safely to destination, that proportion shrinks still further.

110. Different kinds of loss have a different impact on the size of general average. Although engine damage is the most frequent type of general average loss, the following chart (on page 27) shows that it is often the least expensive type of loss in percentage terms. Over half of engine damage incidents result in contributions below one per cent - that is, the mean percentage contribution for engine damage is half that for all categories together. On the other hand, strandings are much more uniformly distributed from small to large losses, while collision and fire losses, the other major categories, are significant for a much higher typical level of contribution. This is demonstrated even more clearly when the losses are quantified in dollar terms in the following section. In summary, in relation to insured values as a whole there is little effective redistribution in the majority of losses.

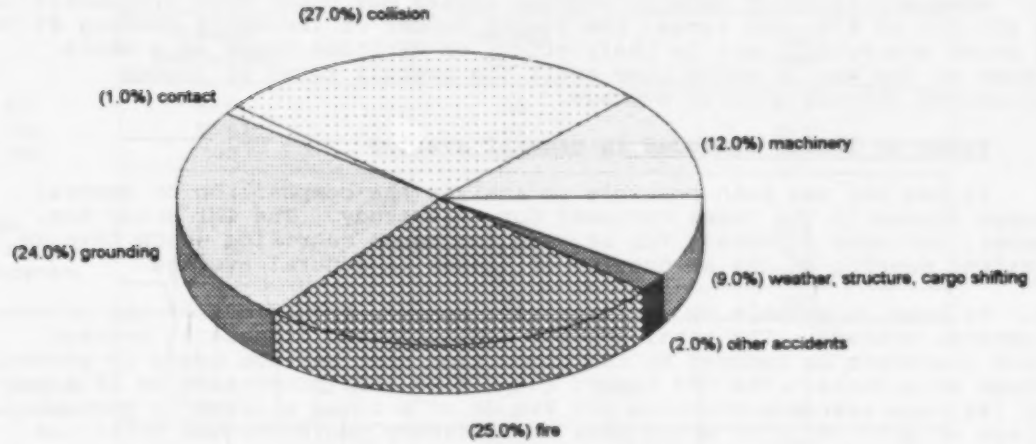
2. Contributions in financial terms

111. When actual financial losses are examined, the picture presented by the analysis of percentage contribution is confirmed. The following table shows that even though machinery failure may cause the greatest number of general averages, as a proportion of total costs it is a less significant cause than grounding. A typical grounding general average is likely to be three times as expensive as a typical machinery failure. With fire and collision, losses are even more serious in relation to frequency and costs. The comparatively few losses arising from contact (with fixed or floating objects) are generally small, while losses from structural damage, severe weather and ice are rather more serious. These losses are inflated, inter alia, by some expensive restowing operations caused by shifting of cargo.

Frequency and financial impact of general average incidents

	Percentage of frequency	Percentage of total financial loss
Machinery failure	37	12
Grounding	24	24
Collision	8	27
Contact	3	1
Fire	14	25
Other accidents	3	2
Weather/structure/cargo shifting	11	9
Total	100	100

The Financial Impact of General Average Losses
(showing total amounts of losses attributable to different causes)



112. The total contributory values in the sample analysed amounted to about $2.1bn and the total general average losses involved were about $103m - a mean contribution of 4.85 per cent. By excluding the highest and lowest losses to avoid distortion from extreme values, the mean contribution falls to 3.40 per cent.

113. The mean total contributory value in the sample was $13.7m, with a mean total for the general average loss of $650,000. By excluding the same extreme values the totals are respectively $12.3m and $430,000. Most of these findings are broadly comparable with the results of the CMI study.[17] However, there was a significant difference between this and the CMI study in respect of the relative contributions of hull and cargo. The CMI survey showed total contributory values of $1,482m for cargo and $2,075.8m for hull - implying that hull interests were shouldering just under 60 per cent of total contributions.

114. This study, probably being slightly more global in scope and including numerous examples involving developing countries, shows the position reversed. When contributory values are used as the yardstick, then the distribution in the sample excluding extremes is: 38.1 per cent hull, 61.4 per cent cargo (including containers), 0.2 per cent time charterers' bunkers and 0.3 per cent freight. However, when actual contributions are considered the share of cargo is higher still: 33.0 per cent hull, 66.7 per cent cargo, 0.3 per cent for time charterers' bunkers and freight together. This latter total is certainly a more accurate reflection of the total burden shouldered by cargo than the total for contributory values, which only reflects the values at risk and not the actual payments that have to be made. It suggests that the higher the percentage contribution, the higher will tend to be cargo's share (see chart on page 41). This is not shown by the CMI study which only reports contributory values. The greater burden on cargo when measured in terms of total contributions rather than total contributory values is largely consistent whatever the cause of the casualty. However, fires and collisions seem to be extremely costly for cargo, with cargo contributions averaging three quarters of the total instead of under two thirds for other types of loss.

115. Mean values are only one measure of assessing the size of general average losses. They help in establishing a broad pattern which allows the different participants to assess the global effect of such losses, but because they conceal such a wide range of different sizes of incident, they are not of great help in assessing the typical size of a general average loss. The chart on page 41 displays the typical distribution of general average sizes, and shows that lower values are much more common.

116. However, although general average losses may occur most frequently in the $50,000 to $300,000 range, the lesser number of incidents costing $0.5m and above are significant in their effect on maritime trade as a whole because of the way in which they swell the overall total of losses reallocated through general average.

3. Types of losses included in general average

117. It has not yet been possible to analyse the composition of general average losses in the cases reviewed for this study. The CMI study has, however, included subtotals for salvage and cargo sacrifice which have an important bearing on the allocation of losses in general average.

118. Salvage is payable by the interests salved, regardless of the existence of general average. The total amounts redistributed in general average should therefore be reduced by the proportion that salvage bears to general average as a whole. The CMI report quantifies that proportion as 29.8 per cent (salvage awards accounting for $40.7m of a total allowed in general average of $136.7m). It would thus be necessary to reduce the total sum redistributed through general average by 30 per cent in order to arrive at a realistic figure.

119. Cargo sacrifice accounts for $9.2m in the CMI study, representing 6.7 per cent of the total of $136.7m. This confirms that the benefit to cargo is limited, with the vast majority of sacrifice and expenses incurred by hull.

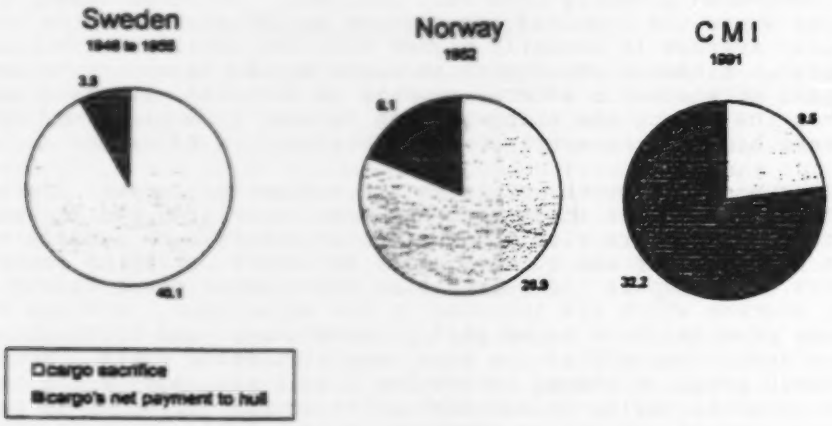
120. Moreover, cargo sacrifice is most frequently found in large fire casualties, where extinguishing damage causes substantial loss to cargo. In such cases - typically on container and general cargo ships carrying many separate interests - cargo has by far the larger proportion of total contributory values, so that any redistribution of loss from cargo to hull is minimal in comparison with the redistribution from one cargo interest to another.

121. According to the IUMI study, "most general average incidents involve sacrifice or expense to the ship. Well under 10 per cent of all costs involve sacrifice or expense for cargo, and indeed very few incidents involve either partial or total loss to cargo. In our provisional figures the main area of cargo costs is in the case of fire, where some goods are damaged or destroyed by the fire and others by extinguishing measures. So it is very clear that the overall effect of general average is to transfer the burden of losses from hull to cargo" (page 6).

122. In 1958 Professor Selmer observed: "whilst general average originally aimed at an equalization of cargo damage (jettison), today the shipowner's expenses make up the main items of general average statements".[18] If that was a valid point at the time, the following data demonstrate that cargo's contribution to the shipowner's expenses has grown to an extent beyond what might have been imagined.

Development in the Movement of Capital from Cargo to Hull

	Sweden 1946 to 1955		Norway 1952		CMI 1991	
Cargo CV	43.6		33		41.7	
Hull CV	56.4		67		58.3	
Total CVs	100		100		100	
Salvage	41.1		33.8		29.8	
Cargo sacrifice	23.6		17.8		6.7	
Ship expenses	35.3		48.4		63.5	
Total	100		100		100	
Cargo sacrifice	23.6	40.1	17.8	26.9	6.7	9.5
Ship expenses	35.3	59.9	48.4	73.1	63.5	90.5
Total	58.9	100	66.2	100	70.2	100
Cargo's prop.of total CVs		43.6		33		41.7
less cargo sacrifice		40.1		26.9		9.5
Cargo's net payment to hull (as percentage of total contributions)		3.5		6.1		32.2



Note: Figures derived from Professor Selmer's book (*op. cit.*), and the CMI study (*op. cit.*).

I. Costs of administering general average

123. General average adjustment involves a great deal of work both by the parties involved and by outside experts engaged by the parties, such as average adjuster, surveyor, broker, agent, etc. The cost of the work carried out by these people appears in the adjustment and includes average adjuster's fees, ship valuer's fees, average disbursements, insurance premiums and brokerage, additional survey fees, expenses of collecting general average security, collecting or settling commission and the shipowner's own expenses for declaring and handling the general average.

124. There are other additional costs not included in the general average statement in respect of which no allowance can be claimed, such as: many administrative and legal costs incurred by cargo owners and their insurers, administrative costs incurred by shipowners, and the costs of any disputes, arbitrations or court actions brought after the statement has been completed.

125. The economic effect of the general average system may be measured not only in terms of the additional costs described above which are inherent in the system, but also by the displacement of total costs from one set of interests to another.

126. An analysis of the adjustment costs itemized within the sample shows that slightly under 10 per cent of the cost of administering general average is accounted for by adjusters' fees together with items such as working expenses (telephones, fax, postage and valuers' fees). However, this does not show the wide variation that can be found between different adjustments. Where there are very few cargo interests and large contributory values, the proportion can be as low as 5 per cent or even less. On the other hand, in extreme cases the proportion can rise to over 25 per cent.

127. Often, a large part of the adjuster's fee is attributable to particular average loss suffered by the ship and included in the same statement - that is, loss suffered by the shipowner which is not shared with cargo interests but is recovered directly from hull insurers. In those cases, there are many instances where the combined fee charged by adjusters for the general and particular average is actually higher than the total contribution obtained from cargo. Although adjustment services may be necessary to some extent regardless of whether a general average is declared, it would appear that sometimes the amount the shipowner can recover from cargo may not in fact compensate him for the extra cost of obtaining an adjustment.

128. In some adjustments, expenses for collecting general average security and settling after the adjustment has been calculated and agreed are shown separately. There are also other expenses specific to general average payable to other parties such as other adjusters, shipping agents or surveyors. Shipowners themselves also incur extra costs specific to the general average which are included in the adjustment. Average disbursements insurance premiums have to be paid in some cases, and although these amounts are very small they add to the total administration costs. These additional costs could possibly amount to another 3 to 4 per cent of the total general average amounts, giving an administrative content of up to 13 per cent. While the cost of collecting security is negligible in cases of single cargo interests, in multi-bill of lading cases the collection of security involves a great deal of time, trouble and expense.

129. It is important to remember that the costs described here only relate to administrative costs included in the average adjustment. In addition there are costs incurred by each shipper, shipowner and insurer as they handle the loss, as well as the cost of involvement by lawyers representing the various parties both before the adjustment has been completed and afterwards. These additional costs are a major factor in persuading insurers that they should either proceed with litigation or accept the adjustment as presented. In a number of developed markets there has been a growing tendency to seek recourse to lawyers to challenge the validity of a general

average on behalf of cargo interests, while it is not unknown for the lawyers themselves to solicit such business:

> "The first time that cargo interests become aware of the fact that a general average exists is normally when an approach is made to them to provide general average security. In the United States of America such a request is often the signal for a host of lawyers to descend upon the case, particularly if it is a substantial or complex one. Their excuse for doing so can at that stage only be the possibility that at the end of the road there will be some form of defence to a general average claim under the Contract of Carriage. Once on the scene, however, they can be a substantial nuisance in other respects, particularly if matters like forwarding of cargo or signature of Non-Separation Agreements are involved. General average procedures which normally operate smoothly and without argument elsewhere are certainly made more difficult".[19]

130. Comments have been received by the UNCTAD secretariat expressing adjusters' disquiet at an increasing willingness to challenge general average adjustments in other jurisdictions as well. The increase in costs that this implies would certainly be more than adequate to raise the total additional costs faced by hull interests alone to more than the amount of contribution obtained by hull from cargo. In some countries, however, the adjuster's statement is by national law legally binding (e.g. Germany).

131. In developing countries the study shows that some cargo owners are uninsured and therefore have to make their own arrangements directly with the shipowner when general average is declared. The additional costs and administrative effort faced by average adjusters and shipowners in dealing with a small minority of uninsured cargo interests may be far higher, and the process take much longer, than in the more established maritime centres. This is described later in the report on the responses from developing countries to the questionnaire.

J. Place of adjustment

132. In countries with a long-established maritime sector the study shows a clear relationship between the country of ownership - not the flag - and the countries where the adjuster is based. For example, German- and Scandinavian-owned vessels are normally adjusted by German and Scandinavian adjusters. Greek ships are often adjusted by London firms, perhaps through a Greek branch office. When the casualty is particularly serious and the adjustment complex, involving many interests scattered throughout the world, the adjustment is often conducted by a local adjuster jointly with one of the major international adjusting firms, while at other times the international adjuster looks after the adjustment almost entirely on his own.

133. In many countries there are not enough adjusters to handle the general average cases of domestically-owned fleets, and in these cases the adjustment normally passes to one of the international firms, based in London, Paris, New York and one or two other centres. In some cases the adjustment is handled domestically but by a branch or affiliate of an internationally-based adjuster. For example, some adjusters of British origin maintain offices in Piraeus for Greek business, New York for American business and Hong Kong for South-East Asian business, while a German adjuster maintains an office in Cyprus (many German-owned ships are flagged out to the Cypriot register).

134. It is difficult to assess how dominant a role is played by the major international firms. For business coming to international insurance markets London adjusters occupy a pre-eminent position, possibly handling more than 40 per cent of adjustments seen in London. The true figure would be even higher because of adjustments completed in other centres by affiliates of the London adjuster, who is thus able to offer a locally-based service and handle tasks such as collecting security, settling the general average and communicating with all the many different intermediaries wherever they may

occur. However, in other European markets the large international firms seem to handle less than 10 per cent of the business, with the remainder going to local adjusters. In some countries adjusters have a statutory role, as well as a nationally-imposed tariff, which may help to add to their independence.

135. In North America average adjustments were traditionally undertaken in-house by insurance brokers, with only a few adjusters pursuing independent careers. However, more recently a number of international firms have established New York branches which have taken a significant proportion of the business.

136. Even though adjustments may be signed in a particular place such as London or Paris, much of the work in compiling and completing the adjustments is often carried out in other places. The adjuster may use his own associated offices elsewhere in the world for tasks such as collecting security, settling debit and credit balances and obtaining invoices and valuations. In other instances the services of local adjusters, marine agents and others are obtained and charged as separate items in the general average.

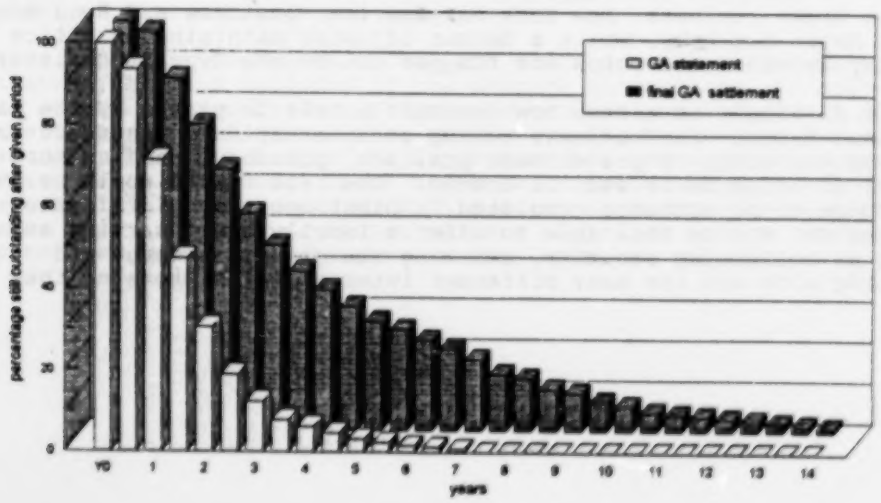
137. For the successful completion of a general average statement it is essential that the adjuster is able to operate from a base where he can draw on all necessary services, communicate effectively with as many parties as possible, have complete freedom to handle the necessary interest-bearing accounts and remit currency without the restrictions imposed by foreign exchange controls. This is borne out by the large numbers of separate amounts to be included in a typical general average and by the close and constant liaison required with underwriters, surveyors, valuers and other professionals. Examples of the difficulties faced when adjustments are subject to the vagaries of foreign exchange controls may be found later in the section describing problems with obtaining general average security.[20] Effectively, for incidents involving interests from several different countries, this militates in favour of the preparation of the adjustment in an international financial and maritime centre.

K. Time taken by the general average process

138. A major criticism levelled against general average is the time and effort it absorbs. Most concerns focus on the time taken to arrange for general average security, to obtain the relevant documentation and contributory values and to settle claims after general average statements have been produced.

139. General average statements include the date of the incident as well as the date the adjustment is completed. As with some of the data analysed earlier, a mean value is of little help on its own but the following chart, which is drawn from a large number of statements, shows clearly the rate at which statements are completed. It also shows the rate at which general average cases are settled.

Time Taken by the General Average Process
(showing the propo-tion of cases
unfinished after a given period)



140. From a sample of 300 adjustments a clear progression emerges. Few adjustments (less than 5 per cent) are completed within six months of the incident, but about 20 per cent are completed within one year. Sixty per cent are completed within two years, 83 per cent within three years and about nine tenths (91 per cent) within four years. Only 2 per cent take longer than six years, although in rare cases an adjustment can take up to 10 years to complete.

141. Most adjustments taking six months or less to complete concern barges, river or coastal shipping, particularly on European navigable rivers such as the Rhine.

142. There are numerous reasons why some statements take so much longer to complete than others, but they can be divided for ease of consideration into two groups - internal and external factors. That is, the amount of work to be done by the average adjuster himself, and the items for whose costs he has to wait for other processes to take their own time to complete.

143. The simplest general averages may have fewer than 10 separate cost elements to be totalled, while the most complex have thousands of separate items that need to be collated from several different ports and repair yards.

144. Some general averages are for two interests only - one cargo interest and the hull itself - while multi-bill of lading cases involve large numbers of separate cargo interests with in turn many different cargo insurers to be contacted. The larger the number of cargo interests the longer the statement tends to take, with the worst cases seeming to involve mixed container and general cargoes. Some statements need to include no more than a page referring to the allocation of loss to a small number of cargo interests, while the longest may have six or seven hundred additional pages detailing all the separate cargoes, the damage done to some of them and their share of general average contribution.

145. Among specific comments received in the answers to the questionnaires about delays, some respondents noted that adjustments for liner trades took longer because of the difficulty faced by adjusters in establishing the contributory values for many separate cargoes.

146. Although most general average losses concern expense or sacrifice by the ship, a high proportion of adjustments taking a long time to complete involve loss, damage and sacrifice to cargo.

147. Furthermore, the adjuster must wait for all the expenditure included in the general average to be determined. Salvage awards - which are made against both hull and cargo but then reallocated in the general average - can take two years or more to be published. Deliberate damage to hull is sometimes only costed three or four years later when the ship is overhauled and repaired.

148. Insurers often complain of delays by average adjusters in providing them with the information they need to perform their own tasks relating to the general average claim. These complaints are not surprisingly balanced by others from average adjusters who are themselves frustrated by other delays on the part of the insurers. It would not be appropriate to comment here on either assertion.

149. When the statement has been produced, the general average is ready for settlement if all parties are ready and in agreement. Many general averages are settled quickly, within a few months of the statement's completion. For many others the work seems to have only just begun. Although insurers start their own claims process when they first hear of the incident, appointing cargo or hull surveyors and studying the facts of the loss from their own point of view, much of their work can only begin after the statement has been completed and they know the exact size of the claim.

150. It has not yet been possible to find a close correlation between the length of time taken to complete a statement and the time then taken to close the claims file, although there seems to be a tendency for slower adjustments to take longer to settle, probably because the issues are complex.

151. As with the time taken by the process of completing statements, cases begin to be closed soon after the statements appear. Fourteen per cent are already settled one year after the casualty, and about two thirds are finished within four years. This is what one might expect in view of the comparable figures for statements themselves: 14 per cent in about eight months and two thirds in about two years.

152. However, the rate of closing files becomes markedly slower after four years, and once six years have elapsed it remains steady for several years more. Although only a quarter of all cases remain open after five-and-a-half years, their numbers dwindle slowly so that 10 per cent are still open after nine years. Only after 12 years have their numbers declined to an insignificant 3 per cent.

153. There are certain difficulties inherent in collecting data on the total time from start to finish, which have to be borne in mind. Insurers' files can remain open for some time after the general average itself has been paid because recoveries - such as collision recoveries - may still be outstanding. Moreover, when a file has stayed open for several years the insurer's claims adjuster may be reluctant to close it until some months have passed since the last payment or correspondence; he may even not always notice that all activity has stopped until he reviews a batch of similar files. As a result it may be prudently assumed that the figures shown in this section exaggerate the time shown for the slower cases by about three months on average, even though efforts have been made to compensate for this.

154. The position reflected in these statistics is probably typical of international maritime trade as a whole. However, it appears that there is a high incidence of cases involving developing countries among the cases which took longer to complete and subsequently to settle.

155. While insurers may find long delays in completion of statements vexing and costly, cargo owners insured with reputable companies may never be aware of more than the initial problems associated with signing an average bond, asking their insurer for a guarantee and obtaining release of their goods. However, delays can have side-effects for cargo owners. Increased costs of claims handling lead to an increase in their insurer's expense ratio and - ultimately - to higher premiums. Cargo owners themselves also face additional administration in locating and supplying documents, and participating, to the extent required by their subrogated insurers, in any resulting litigation.

Chapter III

DIFFICULTIES IN THE OPERATION OF GENERAL AVERAGE - RESPONSES TO THE QUESTIONNAIRE

156. As part of its further researches into general average, the UNCTAD secretariat sent a questionnaire to developing countries members of UNCTAD. It succeeded in eliciting much factual data on recent general average incidents, as well as full descriptions of the concerns of many of the participants in maritime trade about certain aspects of general average.

157. Although the replies were sent to UNCTAD by member governments, they had been compiled on behalf of those governments by a variety of different sectors of maritime industry. Replies were evenly divided between shipowners and insurance companies, with a handful from maritime agents and average adjusters. This had the signal advantage of presenting views from the entire spectrum of maritime trade. As it turned out, even where the respondents were not identified it was possible to guess which industry they came from the tenor of their remarks, and in each case it was possible to confirm the initial guess from a more detailed study of each questionnaire.

158. Where appropriate, the responses to the questionnaire have been integrated with other sections of this report. However, this section deals with the general perceptions of respondents and focuses on the difficulties they face, principally in matters of arranging security. These are less susceptible to statistical analysis than are their accounts - for example, of the time taken by the general average process. The comments are vivid enough to speak for themselves on the problems encountered by the respondents.

159. Almost all responses indicated that problems arose through the unfamiliarity of consignees with the system of general average. On the one hand, comments from shipowners indicated that they faced difficulties because consignees did not understand the principles of general average; they were therefore unwilling to provide security to the shipowner after a general average had been declared, and failed to understand why the shipowner would not release their goods without such a security. On the other hand, cargo insurers pointed out difficulties at both the initial stages of declaration of general average and the obtaining of general average bonds, guarantees and deposits, and in addition problems between insurers and their assureds which are similarly caused by lack of knowledge on the part of the consignees.

160. It is not only consignees who emerge as knowing less than they need to about general average and the processes it requires. A few of the respondents demonstrated that they themselves misunderstood some of the processes involved.

161. At the same time, others commented that the system was too complicated and required simplification. It was not clear whether they were referring to the York/Antwerp Rules or to the procedures involved in handling the practical aspect of general average. Some respondents even used the questionnaire to request that UNCTAD should mount seminars to explain the whole procedure of general average to their country or region.

162. Problems are exacerbated when cargo owners do not take out insurance, as happens from time to time. A disproportionate amount of difficulty is caused by uninsured cargo in the event of a general average. Some shipowners commented most unfavourably on their own difficulties and the delays caused in dealing with uninsured shipments:

> "Many consignees do not insure their consignment and, consequently, it is difficult to obtain general average security from insurance underwriters pursuant to the instructions of the shipowners. Accordingly, the situation must be explained to them and the owners may object to that, thereby causing a delay in the release of the

consignments and loss of time, in addition to the problems that arise with the various interests concerned".

163. A number of other problems are also reported with general average. They include: the occasional late declaration of general average, in which case it becomes difficult to establish the reasons why the general average was declared, as well as impossible to obtain accurate valuations of all the different contributing interests; a belief that a number of general averages were declared which should not properly be handled in that manner, for example, because the owner was thought not to have exercised due diligence to make the ship seaworthy; a general lack of coordination between the various parties with respect to the many different documents that have to be supplied for the general average process, a number citing problems caused by the failure to provide original documents; much criticism of the slowness of the process of adjustment and settlement subsequent to adjustment; lack of local specialists capable of handling general average; and the difficulties inherent in collection of deposits or other acceptable security.

A. Collection of general average security

164. A reply from an average adjuster mentioned difficulties on the part of trading entities in developing countries in providing satisfactory guarantees for cargo's contribution in general average, contrasting this with the position in his own country. He added that "real problems generally arise only in cases where cash deposits become necessary, but strict exchange control regulations exist in the country concerned". A reply from a shipping agent comments:

> "Generally consignees are most reticent to fulfil the necessary formalities, which are:
>
> 1. duly complete the average bond with signature of the consignee and all necessary information;
>
> 2. provide the insurer's guarantee if the goods are assured;
>
> 3. if the consignment is not insured then the consignee must make a provisional deposit representing the percentage fixed by the adjuster on the CIF value of the goods."
>
> "All that consignees are really interested in is to obtain delivery of their goods without any difficulties. Insurers' guarantees are obtained in a reasonable time except if the insurer has no representative locally. However, if goods are not insured we often have extreme difficulty in making the consignee understand that he must submit to the required formalities and make a provisional deposit. If the consignee does not have all the required documents for the necessary formalities, he must present a bank guarantee. That takes a long time because the bank has its own very long procedures to follow before issuing the guarantee. And, at the other end of the process, when the consignee comes to settle finally after the contribution has been determined, in many cases he can no longer find the original of the receipt of the provisional contribution (the deposit) which he must surrender to us in order to obtain reimbursement of any excess he may have paid on the original deposit in comparison with the finally determined contribution."

Insurers face their own problems:

> "Most of these insurance companies are domiciled in third world countries and are not acceptable to shipowners and adjusters; consequently, the bonds must be sent to insurance companies abroad for endorsement and return, which takes a long time."

165. Foreign exchange difficulties play their own part in the process, both at the outset and when final settlement comes to be made. In the first place, there may be a general shortage of foreign exchange to satisfy the shipowners' and adjusters' requirement for a deposit from cargo. As shown by one of the adjustments received from a developing country, in such cases separate accounts for the adjustment amounts must sometimes be opened and maintained in certain countries, increasing the costs of the adjustment and making it less certain that those amounts held in such local accounts will retain their parity with the currency of the adjustment. In that adjustment "general average deposits collected in three ports were remitted to London and placed with a bank to earn interest, together with deposits taken in London. General average deposits taken at two other ports were placed in interest-bearing accounts with local banks pending distribution of funds in accordance with the provisions of this adjustment." The unfortunate result was, some eleven years later, in the case of port A:

> "Considerable difficulties have been encountered as a result of exchange control regulations (in completing collection of debit balances due from cargo). This has compelled us to collect some contributions in local currency; however, we have also persuaded major local creditors to accept part payment from local funds in order to avoid excessive currency depreciation. These offsets have however resulted in a small exchange loss in contributions in US dollar terms."

166. For port B: "There are also some contributions due from port B, from which we arranged collection of cash deposits locally, but as these are necessarily held in local currency (now heavily depreciated), we have so far been unable to obtain effective settlement of the respective contributions."

That small shortfall was supplemented by a large debit balance from the local insurance company whose delay in settlement was confirmed by the embassy of its country as being "due to the extreme shortage of foreign currency. Although they seem to think the debt will be honoured, it is quite clear that it may be several years before this takes place."

167. Similar, though not so extreme, problems are raised by most of the respondents, although others report no significant difficulties at all. Other facets of the difficulties encountered with the provision of general average guarantees are:

> Disagreements over security wordings which are not always acceptable to all parties. It may be very difficult to satisfy the indemnity requirements of one or other party, with a lack of understanding playing its part in friction between the bank, the consignee, the cargo insurer and the adjuster.
>
> Where there is under-insurance on the part of the cargo interest these problems are compounded since the cargo owner has to arrange not only for a guarantee for the insured part of his contribution but an additional bank guarantee to cover the amount under-insured.

168. Failing such a bank guarantee, the assured may have to provide his own cash deposit in addition to the insurance guarantee; where the insurer is not represented in the local market, the assured has to provide his own deposit, or a bank guarantee if he can negotiate one, until he receives a guarantee from his insurer overseas.

169. In this way, administrative costs and delays are incurred by many different parties, but only the time and effort expended by the shipowner and the average adjuster are likely to be included in the cost of the general average itself. The remaining costs are incurred in addition to the final total for the general average.

170. A further concern raised by shipowning respondents is the unwillingness of cargo insurers to provide guarantees where they allege that there has been

a lack of due diligence to make the ship seaworthy. Perhaps understandably, the shipowners regard the reason why the general average was declared in the first place to be irrelevant to the question of collecting security. From the opposing point of view, some insurers comment that it is often difficult to find out exactly why a general average has been declared so they are unable without much further investigation to confirm whether it was caused by a lack of due diligence. They would prefer in such circumstances not to pay any deposit until they know the reasons for the general average, because they report difficulty in obtaining any recovery once they have paid their deposit. The practice of supplying extracts of general average rather than a complete statement is also criticized: just as incomplete information at the outset of a case of general average makes it difficult for the insurer to decide whether a general average guarantee or deposit is justifiable, so when the statement is finally received the absence of detailed information on the casualty makes it difficult for the insurer to decide whether he will accept the general average in toto.

171. Some contributing interests face particular difficulties when responding to requests for general average deposits. A shortage of foreign exchange has already been referred to, but other domestic regulations also have an effect in limiting the cargo owners' ability to comply with the demand for security.

> "Some parties do not pay the cash deposit in freely convertible currency, as in the case of public sector organizations, institutions, ministries and companies, and the shipping agency therefore has to contact the shipowners in order to explain the situation and receive their instructions. The resulting contact and correspondence may take a long time."

Chapter IV

INSURANCE AND OTHER ARRANGEMENTS TO SIMPLIFY THE OPERATION OF GENERAL AVERAGE

172. As stated earlier,[21] the Working Group on International Shipping Legislation (WGISL) requested the UNCTAD secretariat to approach, in close collaboration with the CMI, the insurance industry and other relevant international organizations, to study the extent to which insurance arrangements could simplify the operation of the general average system.

173. The following approaches emerge as a result of consultations with members of the insurance industry, and other international bodies concerned, including the AIDE, and taking account of the discussions within the CMI International Sub-Committee on the Review of the York-Antwerp Rules, which are supported by the findings of this study. The proposals, however, would require further detailed consideration and discussion within the sectors concerned to establish the practical means of their implementation.

A. Elimination of small general averages

174. The incorporation of an "absorption clause", or as it is sometimes called, a "small general average clause", into hull and machinery policies has been the subject of considerable debate during the past 20 years or so. With such a clause, hull underwriters would pay the entire general average claim up to a certain figure without requiring any contribution from cargo. During the preparatory work within the CMI on the revision of the York-Antwerp Rules in 1974, proposals were made to incorporate a non-deductible franchise into the Rules, either as a fixed figure or as a percentage of the contributory values or the value of the ship. The proposals were ultimately rejected as being impractical. The present CMI International Sub-Committee on the Review of the York-Antwerp Rules, while considering that the use of absorption clauses should be encouraged, again did not favour their inclusion in the York-Antwerp Rules[22] as they felt that such a provision was best left for the insurance market to deal with.

175. The subject has also been considered within the AIDE by a number of Working Groups. "In principle, the AIDE strongly endorses the desirability of eliminating uneconomic cases of general average and is of the opinion that this aim is best achieved by shipowners waiving their right of contribution in consideration of a general average absorption clause in their hull and machinery insurances. The chief advantage of this system is that the relevant figure can be fixed between the assured and his underwriters so as to reflect the requirements of the former, having regard to different types of ship and differing trade conditions."[23]

176. Furthermore, members of the AIDE International Sub-Committee endorsed the opinion expressed by the AIDE Working Group that: "(a) the introduction of a fixed figure franchise which would be meaningful in the case of a general average by an ocean-going container vessel or a VLCC would cause hardship in the case of a general average by a smaller vessel, say in the coastal trade; (b) the introduction of a minimum percentage of contribution, even when realistic for vessels in the liner trades carrying cargoes under numerous bills of lading, would not necessarily be realistic in general average cases involving bulk cargoes; furthermore, in marginal cases an adjustment would have to be prepared in order to ascertain whether or not the claim amounted to the stipulated percentage, and this aspect might well be open to abuse."[24]

177. Although there is widespread support for the elimination of small general average cases, no concrete solutions have yet emerged. The matter therefore remains in the hands of individual shipowners and insurers to settle according to their own interests. Unfortunately, absorption clauses are "only included in a minority of policies and in many cases not in the policies of those small or impecunious shipowners who really need them;

large, wealthy owners are usually those who can and often do absorb small general averages themselves."[25] As matters stand at present therefore absorption clauses are providing no solution.

178. Given the present situation and taking account of the features of general average which are highlighted in this report, one could indeed conclude that there is little or no place for general average in marine insurance, or for that matter in maritime trade as a whole. Views have been expressed by some members of the marine insurance industry that the most effective means of simplification of general average is complete abolition. There is already a long history of calls for abolition of the general average system dating back at least to 1877.[26] Although data provided in this report may be regarded by many as providing ample justification for those in favour of abolition, yet it is clear that such a course of action would not be likely to be supported by some commercial interests. The following extract from comments by an average adjuster in drawing up the statement for a vessel which caught fire in 1987 may provide some explanation:

> "At the early stages of the case, it was estimated that the cargo interests would bear a very high percentage of the general average expenditures in view of the small scrap value of the wreck as against the large value of the cargo in the number 1-4 holds. Therefore, the shipowners decided to declare general average and instructed ourselves to collect security from the cargo interests."

179. It is indeed a widely held view that the general average system is mainly beneficial to shipowning interests. It can, in any event, be safely assumed that total abolition would not be viewed favourably by all the parties concerned. In these circumstances an interim practical measure would be to take positive action to eliminate all small general average cases. It is therefore proposed that standard absorption clauses drafted by the insurance industry be incorporated in all hull and machinery policies for cargo-carrying vessels. Members of the AIDE are willing to offer their assistance in the event of any call by insurance markets to introduce some degree of standardization in the wording of absorption clauses.[27]

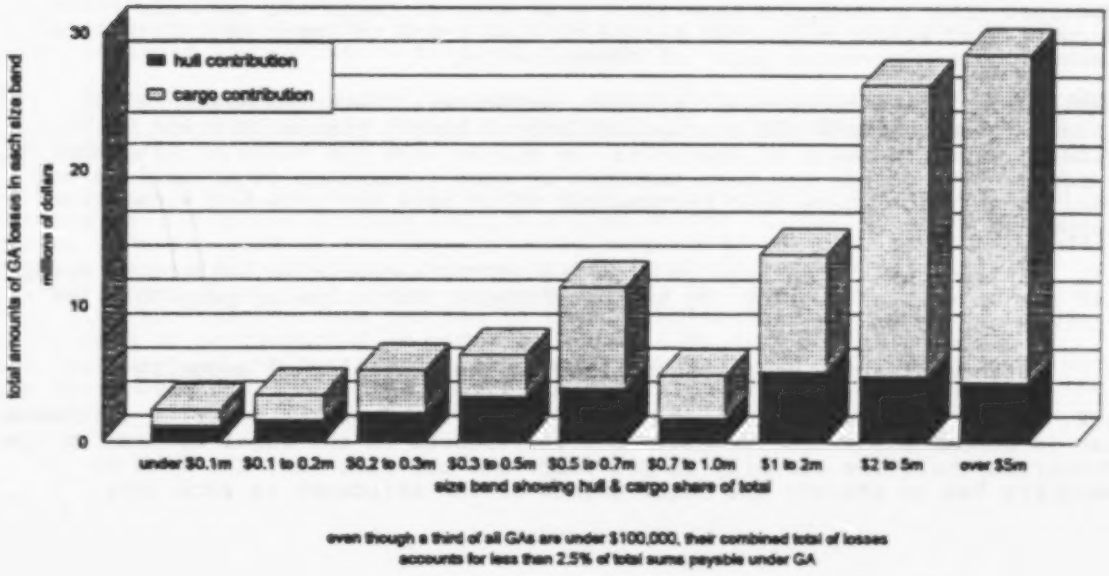
180. The proposed standard clauses could be drafted to include alternative provisions to suit the requirements of different traders, with thresholds inserted at a level appropriate for each vessel. The threshold could be determined as a fixed figure or as a percentage of hull insured value.

181. This would result in saving the disproportionate amount of time, effort and expense involved, particularly in the collection of security, which, especially in the case of liner trades, is "one of the most time-consuming, irritating and expensive aspects of general average for all parties to the adventure, and for the average adjuster if he is charged with its collection."[28]

182. As is apparent from this report, the majority of general average losses are small in proportion to total insured values. In the cases reviewed 14 per cent of general average losses amounted to one per cent of the ship's contributory value and 27 per cent amounted to less than 2 per cent. Thus, even at these comparatively modest levels, it would be possible to effect a marked reduction in the total number of cases treated as general average. A threshold of 4 per cent would have eliminated around 45 per cent of the cases reviewed. In money terms, thresholds are at present most often set at $100,000 or $200,000. A $100,000 threshold represents 2 per cent of a ship valued at $5m, which is an approximate average value for ships in the survey, while $200,000 would amount to 4 per cent.

Size of General Average Losses
(relative frequency of different sizes of loss)

Size of General Average Losses
(sum of all general average losses monitored in bands shown)


total amounts of GA losses in each size band
millions of dollars
30
20
10
0
hull contribution
cargo contribution
under $0.1m
$0.1 to 0.2m
$0.2 to 0.3m
$0.3 to 0.5m
$0.5 to 0.7m
$0.7 to 1.0m
$1 to 2m
$2 to 5m
over $5m
size band showing hull & cargo share of total
even though a third of all GAs are under $100,000, their combined total of losses
accounts for less than 2.5% of total sums payable under GA

183. This approach would only require the incorporation of appropriate standard absorption clauses into hull and machinery policies, without any change to the general average system itself and without any significant burden on the parties concerned.

184. Cargo owners and their insurers would be spared the disproportionate effort spent on claims for trivial sums of money, as in multi-bill of lading cases even substantial general averages can result in small sums being due from individual cargo interests.

185. Such a clause would not prevent shipowners from recovery against other interests after major general average incidents. At the same time shipowners would be spared possible interruptions to their trading patterns caused by general average problems. Maintaining tight turn around schedules and fulfilling future chartering obligations could more than compensate for contributions to small general average losses. Moreover, their own administrative costs could easily outweigh the contribution they might receive from cargo interests in small general average cases.

186. From the hull insurer's point of view the loss could be treated in the same way as any other partial loss, and could therefore be settled without delay. There would be no need to reserve an uncertain amount against a loss payable in the future, or to spend time and effort continually updating reserves during that time. Furthermore, they would be spared all the administrative and possible legal costs involved.

187. Average adjusters would also welcome the elimination of small general averages, particularly in multi-bill of lading cases involving the collection of security from possibly thousands of different cargo interests.

188. By adopting this approach general average adjustment could be limited to the most serious casualties where arguably it is most justifiable to distribute the loss among the interests involved.

B. Simplification of procedures for the provision of general average security

189. As has been seen from this report, many of the complaints against general average centre on the fact that procedures for the provision of general average security, especially in multi-bill of lading cases, involve excessive time, trouble and expense.[29] "... the procedures for establishing the identity of cargo underwriters and for expediting the release of cargo in multi-bill of lading cases are no more advanced than they were twenty years ago. The extent of the work involved in obtaining securities in a large manifest case is much the same as it ever was, although the task can now be accomplished within a shorter period of time owing to improved information technology and speedier means of communication."[30]

190. All parties concerned, including shipowners, cargo owners, underwriters, salvors and average adjusters, have a common interest in finding ways and means of operating the system with the minimum delay and expense. The matter has been examined by some interested organizations and various solutions have been recommended which have not received widespread support.

191. In response to an enquiry from the UNCTAD secretariat, a Working Group was set up within the AIDE and has put forward the following proposals for further consideration:

1. Standardization of forms utilized in the provision of security

192. It is recognized that some variation in the forms of security in common use is probably inevitable, given the differences in the legal systems in the countries where the security is provided, and the fact that the form of security has to satisfy the requirements of the shipowner in each case.

However, it has been noted that some forms in common use - in particular forms which provide in the same document for the signatures of receiver and cargo underwriter - are sometimes objected to in certain markets. The AIDE Working Group has therefore suggested that efforts should be made to accord international recognition to a set of standard forms for general use.

2. Elimination of the need for "double-backed" security

193. To obtain release of the goods the usual form of security required is the giving of an average bond, together with a satisfactory guarantee from the cargo underwriters.[11] Although the law in most maritime countries recognizes the validity of a cargo underwriter's guarantee as a primary undertaking and not merely collateral security, it is considered, by the AIDE Working Group, that shipowners will be unlikely to dispense with the usual requirement for an average bond in addition to a cargo underwriter's guarantee. This is to: (i) secure uninsured cargoes, and (ii) provide a "fall-back" security if cargo underwriters cease to trade or become insolvent.

3. Inclusion of an undertaking to pay in contracts of carriage

194. The possibility of introducing an appropriate clause into bills of lading, by which cargo receivers are bound to pay contribution, has been considered on numerous occasions. Prior to the 1974 revision of the York-Antwerp Rules, IUMI suggested, with particular reference to the carriage of goods in containers, that a clause be inserted in bills of lading for general maritime transport, reading as follows:

> "In case of general average the owners agree to deliver the goods carried under this bill of lading to the receivers without insisting on the presentation of a special general average bond and without requiring, immediately, a general average deposit. In consideration hereof, the merchant (and/or receiver) undertakes to deliver on demand to the owners an undertaking from an insurer of good repute to the effect that the general average contribution eventually due from the cargo carried hereunder will be paid by such insurer, or alternatively, undertakes to pay to the owners a general average deposit or to put up such other security for the payment of the general average contribution as is acceptable to the owners."

195. Although this or similar wording is sometimes inserted in bills of lading for general cargoes, the practice is by no means universal. In the experience of members of AIDE, it is shipowners' preferred practice to demand general average security in the usual manner before the cargo is released to the receivers, although most shipowners in the general cargo trades are content to release cargoes on a mere undertaking when time is pressing in order to avoid inconvenience to their customers.

4. Encouragement of market agreements whereby cargo underwriters undertake to provide the appropriate security documentation subsequent to release of the goods

196. It is understood that there have been discussions in the insurance markets of the United Kingdom and the United States of America as to the manner in which each of the markets would respond if asked to provide general average guarantees after the release of the goods to receivers. It is, however, considered that these agreements would be of limited effect as they only bind the institutions parties to them. Furthermore, shippers of cargo still have to be contacted in order to advise them of the circumstances of the casualty and the declaration of general average, and to ascertain whether the goods were insured in the country of origin and if so the identity of the insurers.

5. Combining the collection of security for both salvage and general average

197. In cases involving general cargoes shipped under numerous bills of lading, the provision of two sets of security - the security required by the salvor in the form prescribed in the salvage agreement, and the provision of general average security as required by the shipowner - can be tedious, time-consuming and costly. Until fairly recently, it was usual for the securities to be demanded by different parties - on the one hand, the salvor's lawyer, and on the other the shipowner or the average adjuster - and this involved duplication of work and effort.

198. For some time, however, average adjusters have been in a position to offer their services to salvors with a view to combining the tasks of collecting security for both salvage and general average as one operation. Efforts have been made to prepare a combined general average/salvage guarantee form. Such a form could only be used when the salvor is prepared to accept the cargo underwriter's guarantees in place of a more formal procedure, such as may be prescribed in the form of salvage contract.

C. Encouragement of a more prompt settlement of general average contributions

199. One of the criticisms of the general average system is the length of time elapsing between the issue of a general average adjustment and the actual settlement. One of the reasons frequently given for delay in settlement is the time required for investigation, whether or not cargo interests have a prima facie case to challenge their obligation to pay general average contributions on the ground that the general average act has arisen from a breach of the contract of carriage. While this is true in some cases, it is the experience of AIDE members that extensive delays also occur even in the most straightforward cases.

200. It has been suggested in the context of the current review of general average being undertaken by the CMI that a partial solution to this problem would be to extend the period that general average interest is allowed to run to a date subsequent to the issue of the general average adjustment.

Notes

1. See Decision 7 (XIII), Report of the Working Group on International Shipping Legislation on its Thirteenth Session (TD/B/C.4/ISL/59), annex 1, para. 1.

2. See Report of the Standing Committee on Developing Services Sectors: Fostering Competitive Services Sectors in Developing Countries - Shipping, on its First Session (TD/B/CN.4/13), annex 1, para. 11.

3. For previous activities of the CMI on general average, see "General Average - A preliminary review" (TD/B/C.4/ISL/58), paras. 7-11.

4. See paras. 29-52.

5. Some of the more acute problems faced in developing countries in connection with arranging security are depicted in chapter III.

6. See also sections 66(6) and 73(1).

7. See paras. 24-27.

8. See para. 28.

9. For a typical wording see Rule 19, Section 17, of the Britannia Club Rules.

10. For circumstances in which cargo owners may refuse to pay general average contributions, see "General Average - A preliminary review" (TD/B/C.4/ISL/58), paras. 58-68.

11. See the Steamship Mutual Underwriting Association Rule 25, Section XXVI.

12. See IUMI 1993 Casualty Statistics.

13. Report prepared by Bent Nielsen on General Average Statistics.

14. Lloyd's Register Annual Statistics, 1992.

15. Two smaller samples from particular countries showed grounding/stranding as slightly more frequent than engine breakdown, suggesting that there may be regional variations in the type of casualty. Engine breakdown nevertheless represented a similar proportion of the total to its share in the main sample.

16. The report presented at the IUMI Conference in Stockholm in September 1993, p. 5.

17. As referred to in para. 56.

18. The Survival of General Average - a Necessity or an Anachronism? (Oslo University Press, 1958), p. 180.

19. John Crump, a former Chairman of the British Average Adjusters' Association, "General Average, Salvage and the Contract of Affreightment", a paper presented at the 11th Annual Conference of the Maritime Law Association of Australia and New Zealand, Christchurch-Queenstown, 12-19 October 1984, p. 9.

20. See paras. 164-171.

21. See para. 1.

22. Report of the CMI International Sub-Committee.

23. See the AIDE Report presented to the VXIIth General Assembly, Prague, September 1993, p. 15.

24. *Ibid.*, p. 14.

25. Address by C.S. Hebditch, then Chairman of the British Association of Average Adjusters, May 1990.

26. For discussion on this matter see "General Average - A preliminary review" (TD/B/C.4/ISL/58), part two.

27. Report by the AIDE Working Group, submitted to the UNCTAD secretariat, April 1993.

28. See C.S. Hebditch, *op. cit.*, p. 25.

29. For discussion on the provision of general average security, see "General Average - A preliminary review" (TD/B/C.4/ISL/58), chap. V, paras. 77-89.

30. The AIDE Report presented to the XVII General Assembly, *op. cit.*, p. 16.

31. For discussion on the various types of general average security, see TD/B/C.4/ISL/58, paras. 77-89.